

NOV 21 1988

JOSEPH F. SPANOL, JR.
CLERK

(12)

No. 87-6177

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1988

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

JIM MATTOX
Attorney General of Texas

CHARLES A. PALMER*
Assistant Attorney General

MARY F. KELLER
First Assistant
Attorney General

WILLIAM C. ZAPALAC
Assistant Attorney General

LOU McCREARY
Executive Assistant
Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

* *Counsel of Record*

6 pp

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1988

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent¹ herein, by and through his attorney, the Attorney General of Texas, and files this Supplemental Brief.

I.

In his opening brief Penry argued that two public opinion surveys support his position that there is a national consensus that mentally retarded

¹For clarity, Respondent is referred to as "the state," and Petitioner as "Penry."

prisoners under sentence of death should not be executed. The state, in response, pointed out flaws in those polls which cast substantial doubt on their validity (Respondent's Brief at 40-42).

II.

Since the filing of the state's brief, the results of another poll on this subject have been released. An organization called Texas Poll has conducted a survey in the State of Texas, the results of which are attached hereto as an appendix. According to that poll of 1,008 persons, 86% favor capital punishment but 73% oppose capital punishment for the mentally retarded.

As in the polls cited by Penry, this latest survey has serious methodological problems which render its results virtually meaningless. The question regarding execution of the mentally retarded embraces no other relevant facts such as the details of the crime, the definition of "mentally retarded" or the degree of retardation of the defendant. Indeed, as worded, the question could be understood to ask whether a defendant should be executed simply *because* he is retarded. Further, without the guidance of a definition or other instructions, a layman would equate "mentally retarded" with "doesn't know what he's doing," a highly misleading assumption given that Penry's jury rejected the insanity defense he advanced based on his mental retardation. Mental retardation occurs in varying degrees of severity, and there are, of course, retarded individuals who truly do not know what they are doing and are therefore "insane" in the legal sense. Penry does not fit into that category, however. Given the horrible crime that Penry committed and his awareness of the consequences of his actions, he should not avoid being justly punished simply by virtue of his inclusion in a category referred to by mental health professionals as "retarded."

The polls upon which Penry relies support his position only because of the misleading way in which the questions were worded. The state could argue with equal logic that 86% of those polled favor execution of the mentally retarded because they made no such qualification in responding affirmatively to whether they favor capital punishment. In short, the public opinion surveys upon which Penry relies are wholly unreliable and should be given no weight by this Court.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

APPENDIX A

CHARLES A. PALMER*
Assistant Attorney General

WILLIAM C. ZAPALAC
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

Attorneys for Respondent

**Counsel of Record*

THE
TEXAS
POLL
1005 Congress Ave.
Suite 740
Austin, Texas 78701
(512) 478-9646

The second set of press releases from the Fall Texas Poll is enclosed.

* * * * *

Here is the exact wording of questions used in the enclosed stories:

* * * * *

CPI. Do you think that Texas should have capital punishment?

Yes	86
No	10
Don't know/Refused/NA	4

CP3. Should capital punishment be used in cases where the person is mentally retarded?

Yes	11
No	73
Don't know/Refused/NA	16